

## GIFTS, OFFICES, AND CORRUPTION

*Zephyr Teachout\**

### I. FOUR DISPUTES AND ONE AGREEMENT

When the Americans set up their new, independent government, they brought an original attitude towards offices and gifts which separated them from Europe. Gifts, which were part of European diplomatic culture, were recast as corrupt influences. And offices were viewed with fear of their corrupting power, given the examples of Europe. The “corner-stone” of the new Constitution, according to one delegate, was the provision designed to prevent lucrative offices from being sold and traded for political power.<sup>1</sup> This Essay, a response to Seth Barrett Tillman’s challenge to my previous writing on founding era anxiety about corruption, is a partial exploration of the scope of the clauses relating to gifts and office holding.

Tillman<sup>2</sup> and I disagree about four significant things, but we agree about one even more significant thing. First, we disagree about how to interpret the changes in the Foreign Emoluments Clause from the Articles of Confederation to the Constitution. Second, we disagree about the precision with which the words “office under/of the United States” were used in the Constitution. Third, we disagree about how important these disputes are for contemporary constitutional doctrine. Fourth, we disagree about the degree of obsession with corruption exhibited by the men who wrote the original American Constitution. The bulk of this response will be to explain some of my thoughts on these disagreements.

However, these disagreements all lie in the shadow of one major agreement: that the Constitution contains within it a structural commitment to fighting corruption. Our disagreements go to the scope of the anti-corruption principle, not its existence. Were our shared understanding to prevail, it would have a substantial effect on doctrine, especially in the area of political regulation. It would likely change the outcomes in some of the more controversial cases in recent years—such as *Citizens United*<sup>3</sup>—and

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<sup>1</sup> See Hon. Robert Yates, The Notes of the Secret Debates of the Federal Convention of 1787 (June 22, 1787), in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 389, 437–38 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 2d ed. 1891) (statement of George Mason) (link).

<sup>2</sup> Lecturer of Law, National University of Ireland Maynooth. This Essay is in response to Tillman’s recent publication, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1 (2012) (link).

<sup>3</sup> *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

would certainly change the methodology by which the Justices reached their outcomes, because they would have to address a constitutionally weighty interest in election regulation. Adoption of the principle would also affect the broad cultural understanding of what the American Constitution is intended to do, and would therefore affect our understanding of ourselves as Americans; our national identity is derived in part from our relationship to what we perceive to be constitutional principle.

Given this agreement, I am interested to hear what Professor Tillman thinks about some questions I am exploring about the anti-corruption principle (ACP). The question of whether—and how—the ACP is a constitutional principle forces questions of when, how, and which non-textual principles should have doctrinal force. If it is a principle, how should it interact with doctrine? If it is a canon of construction, what other clauses can it help construe? The ACP forces some basic questions that are often shunted aside, as academics and judges assume two structural principles (separation of powers and federalism) without explaining why those two, and not others, get pride of place in doctrine. What makes a constitutional principle one that can legitimately be credited with separate weight in doctrine? How can one tell the difference between a “constitutional principle” and a canon of construction that goes to the interpretation of the language? Furthermore, do we have the other “principles” right? Should we understand the separation of powers as a freestanding commitment to separate, co-equal branches of government, or is it better understood as an extension of the Framers’ concern with the corrupting dangers of appointments powers? An important set of essays by John Manning challenges the idea of structural principles from the perspective of a textualist who rejects the model.<sup>4</sup>

I am not quite the originalist Tillman makes me out to be. Rather, I am interested in understanding the Constitution’s relationship to corruption for a set of quasi-originalist reasons. First, I am concerned that the First Amendment is the cause of much bad law in recent years. Explaining the corruption history behind our Constitution should check some of the more dangerous tendencies within First Amendment absolutism. If one is going to be an originalist in talking about the First Amendment, one ought to take great care to give weight to the corruption concerns at the time of framing. Second, I find the history important because it reflects the thinking of the Framers; an intelligent, thoughtful group of people who had a striking

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<sup>4</sup> For arguments against recognizing any structural principles, and a rich discussion of the different ways in which these structural principles are used, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011) [hereinafter Manning, *Separation of Powers*] (arguing that there is no freestanding separation of powers principle) (link); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004) [hereinafter Manning, *Eleventh Amendment*] (arguing that the Court has overextended the scope of the Eleventh Amendment by invoking “purposivism”) (link).

combination of theoretical and practical experience. We ought to attend to their thinking and anxiety with some respect. Third, history is important because of the threat of dependencies on money and power to our current democracy, where similar—though not precisely the same—kinds of corruption are rampant. Fourth, purpose must always be an important part of any reading of the Constitution; not as a matter of strict originalism, but as a way to understand what was intended as a constraint on judicial overreach.

And finally, as the prior paragraph suggests, I am interested in the selective use of structural principles by the courts.<sup>5</sup> Many of the concerns that people have raised about the “anti-corruption principle” are not specific to the anti-corruption principle, but apply to all constitutional principles. If one believes that the anti-corruption principle requires a textual hook, one clearly should make the same requirement of the separation of powers principle or reject it as a freestanding principle with independent weight.<sup>6</sup>

That said, Tillman’s specific challenges warrant response. In this piece, I will argue: first, that the tweaks in the Foreign Emoluments Clause from the Articles of Confederation to the Constitution do not constitute a weakening; second, that the meaning of “office under the United States” was not clearly confined to appointed offices at the time of the Constitution’s writing; and third, that the outcome of our disagreement on whether the Foreign Emoluments Clause applies to elected officials is not important for whether or not an anti-corruption principle should be recognized. Finally, and throughout, I will discuss our disagreement about whether the men who wrote the Constitution were focused to the point of obsession on corruption concerns.

## II. THE FOREIGN EMOLUMENTS CLAUSE

There are nearly two dozen features of the original American Constitution that were designed to combat corruption, including the veto power and the requirements for legislative override, the census, the residency requirements for representatives, the rules governing payments, the electoral college, and the Ineligibility Clause.<sup>7</sup> Tillman points out one—the Foreign Emoluments Clause—and argues that because I misunderstand it, the strength of the anti-corruption principle is called into question. He is correct to say I put a great deal of emphasis on it, and I do so somewhat for

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<sup>5</sup> See Manning, *Separation of Powers*, *supra* note 4; Manning, *Eleventh Amendment*, *supra* note 4.

<sup>6</sup> The Framers explicitly chose not to include separation of powers language in the Constitution, a departure from many of the state Constitutions and a sore point for some of the Constitution’s critics during ratification. See THE FEDERALIST NOS. 47–51 (James Madison).

<sup>7</sup> See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 354 (2009) (“The size of the houses, the mode of election, the limits on holding multiple offices, the limitations on accepting foreign gifts, and the veto override provision were all considered in light of concerns about corruption, and designed to limit legislators’ opportunities to serve themselves.”) (link).

symbolic reasons. But my own emphasis echoes the anxiety about foreign gifts that existed at the time of the Constitutional Convention.

A. *The Foreign Emoluments Clause in the Constitution and the Articles of Confederation*

The Foreign Emoluments Clause (FEC) in the Constitution states:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.<sup>8</sup>

My focus in my earlier writing, and the focus of our debate, is the prohibition on accepting presents. This clause is derived from an earlier clause within the Articles of Confederation which stated:

[N]or shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince or foreign State; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.<sup>9</sup>

As Tillman notes, these two provisions are not precisely the same.<sup>10</sup> The first difference between the two is that the Constitution's version allows for Congress's approval in the acceptance of gifts. By providing that gifts may not be accepted "without the Consent of Congress," it opens up the possibility of Congress's approval. The second difference is that the Articles of Confederation prohibition covered "any person holding any office of profit or trust under the United States, or any of them," whereas the Constitutional prohibition covers any "person holding any office of profit or trust under them."

The concern with corruption in this provision was twofold. First, there was a particular concern that agents of the United States would lose their allegiance (or would be suspected of doing so) because of the opulent gifts from foreign princes, in particular those from France.<sup>11</sup> Second, this clause is a rejection of the entire political culture of old Europe, which was seen as

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<sup>8</sup> U.S. CONST. art. I, § 9, cl. 8 (link).

<sup>9</sup> ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1 (link).

<sup>10</sup> See Tillman, *supra* note 2, at 5.

<sup>11</sup> See DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 321–45 (Richmond, Enquirer-Press 2d ed. 1805) (link).

corrupt. As Thomas Jefferson wrote, explaining what he saw as the prevailing view of 1790:

We have a perfect horror at everything like connecting ourselves with the politics of Europe. It would indeed be advantageous to us to have neutral rights established on a broad ground; but no dependence can be placed in any European coalition for that. They have so many other by-interests of greater weight, that some one or other will always be bought off. To be entangled with them would be a much greater evil than a temporary acquiescence in the false principles which have prevailed.<sup>12</sup>

The Foreign Emoluments Clause usefully exemplifies the Founders' efforts to redefine the scope of corruption more broadly than England or France. As Randolph explained in the debates about the Constitution in Virginia, "[t]his restriction was provided to prevent corruption."<sup>13</sup> It is, and was understood to be at the time, a fairly radical break from the generally accepted practice of nations in foreign affairs. The particular ban against receiving foreign gifts finds its initial source in the Dutch Republic, which adopted a rule in 1651 that its foreign ministers were not allowed to take "any presents, directly or indirectly, in any manner or way whatever."<sup>14</sup>

A contemporary writer critiquing the Dutch rule wrote: "The Custom of making a Present . . . [is] so well establish'd that it is of as great an Extent as the Law of Nations it self, there is Reason to be surpris'd at the Regulation that has been made on that Subject in Holland."<sup>15</sup> He made fun of their puritanical refusal to accept even the most trivial presents, and mocks them for imagining themselves as creating a "Republic[] of Plato" in the "Fens and Marshes."<sup>16</sup>

In choosing to adopt, and then maintain the rule against United States representatives accepting foreign gifts, the Founders were truly trying to create their own "Plato's Republic" against what they perceived as corrupt European practices.

Gifts of the sort referred to in the clause were exactly the currency of diplomacy at the time that Jefferson so abhorred. The King of France, Louis XVI, had a love of snuffboxes—so much so that he gave them his own

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<sup>12</sup> Letter from Thomas Jefferson to William Short (Oct. 3, 1801), in 10 THE WRITINGS OF THOMAS JEFFERSON 284, 287 (1903) (link).

<sup>13</sup> See ROBERTSON, *supra* note 11, at 330.

<sup>14</sup> 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 651 (1906) (quoting Dutch Republic regulation) (link).

<sup>15</sup> MONSIEUR DE WICQUEFORT, THE EMBASSADOR AND HIS FUNCTIONS 292 (John Digby trans. London, Bernard Lintott 1716) (emphasis omitted) (link).

<sup>16</sup> *Id.* (emphasis omitted).

name, “*boîte à portrait*.”<sup>17</sup> He was very fond of giving extravagant versions of these boxes, set with diamonds, to diplomats. The American recipients of these gifts showed repeated anxiety about what to do with them.<sup>18</sup> The new country was trying so hard to separate itself from courtly culture, and the Articles of Confederation forbade accepting these gifts, but it seemed terrible form to reject them outright.

When Arthur Lee received one such jeweled snuffbox from Louis XVI,<sup>19</sup> he was concerned about the impacts of accepting it. He wrote to a friend that the situation might “excite some murmurs,” and thought that the Articles of Confederation might prevent accepting the gift.<sup>20</sup> He wrote to his brother, “[a]s you may imagine, I was embarrassed about receiving or refusing it.”<sup>21</sup> He explained that he had told the court that receiving such a gift was against the rules of those he represented. According to Lee, “[t]he Count answered that this was a mark of his Majesty’s esteem, and was never refused.”<sup>22</sup> Lee accepted the gift, but gave it to Congress to determine what to do with it. As he was then embroiled in accusations that he had given offense to the French court, the gift also served for Lee as “proof . . . of the untruth” of the accusations against him.<sup>23</sup>

When Benjamin Franklin was leaving France after several years in Paris, he too received “the usual gift to a minister plenipotentiary after someone had signed a treaty with the French court.”<sup>24</sup> But this was an especially extravagant version of it—an extraordinarily expensive and elaborate *boîte à portrait*. It bore the portrait of Louis XVI on a particularly impressive gold box.<sup>25</sup> On the top were 408 embedded diamonds “of a beautiful Water,” all crowning the box forming a “Wreath round the Picture and a Crown on the Top.”<sup>26</sup> It was this box, or perhaps Lee’s box, that Governor Randolph referred to in his explanation of the Foreign Emoluments Clause when he explained during the ratification debates that: “A box was presented to our ambassador by the king of our allies. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.”<sup>27</sup>

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<sup>17</sup> FAYE STRUMPF, LIMOGES BOXES: A COMPLETE GUIDE 134 (2000).

<sup>18</sup> See *infra* note 19 and accompanying text.

<sup>19</sup> 18 JOURNALS OF THE CONTINENTAL CONGRESS 1114 (Dec. 1, 1780) (1910) (link).

<sup>20</sup> 2 RICHARD HENRY LEE, LIFE OF ARTHUR LEE 143 (Boston, Wells & Lilly 1829) (link).

<sup>21</sup> Letter from Arthur Lee to William Lee (Jan. 22, 1780), in 3 LETTERS OF WILLIAM LEE 775, 775–76 (Worthington Chauncey Ford ed., New York, Historical Printing Club 1891).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 776.

<sup>24</sup> RONALD CLARK, BENJAMIN FRANKLIN: A BIOGRAPHY 396 (1983).

<sup>25</sup> See STRUMPF, *supra* note 17.

<sup>26</sup> Letter from William Temple Franklin to Thomas Jefferson (Apr. 27, 1790), in 3 THE FOUNDERS’ CONSTITUTION Art. 1, § 9, cl. 8, doc. 11 (Philip B. Kurland & Ralph Lerner eds., 1987) (link).

<sup>27</sup> ROBERTSON, *supra* note 11, at 330.

*B. The Constitution's Foreign Emoluments Clause Was Not a Deliberate Weakening of the Foreign Emoluments Clause from the Articles of Confederation*

Tillman misreads the two changes in the clause from the Articles of Confederation to the Constitution. He argues that the changes undermine the notion that the men who drafted the Constitution were deeply focused on the problem of protecting against corruption. According to Tillman, the later clause weakened the earlier clause, and “obsession” is thus too strong a word to use in describing the Framers’ mindset.<sup>28</sup>

I disagree. The first change, the addition of Congressional acquiescence in the Constitution’s FEC, simply codifies the accepted interpretation of what the clause required previously. When Lee and Franklin received their snuffboxes, they clearly thought it satisfied the clause to present the gift to Congress, and if Congress approved, they (and Congress) believed they could keep it without violating the rule. This appears to be a direct adoption of the Dutch practice. According to John Quincy Adams, he asked friends in Holland how they interpreted the clause, and was told that the absolute language of the clause merely forbade the unilateral acceptance of gifts; they could be kept if the government granted permission.<sup>29</sup>

Therefore, the change merely puts in writing what was already the accepted meaning of the clause. Moreover, Congressional acquiescence is not a minor check. It takes power from the executive branch and gives Congress oversight responsibility to make sure that officers (the scope of which is discussed below) are not being seduced from their obligations to the country. The congressional requirement leads to a radical transparency and interrogation that could chill quiet transfers of wealth for affection.

Tillman argues that the second change, in which the Articles’ “office of profit or trust under the United States, or any of them”<sup>30</sup> is replaced in the Constitution by “Office of Profit or Trust under them”<sup>31</sup> is significant in that it uses the word “them” instead of “it”; in other words, the fact that the Constitution uses a plural—instead of a singular—designation implies that state officers are not covered by the Foreign Emoluments Clause.

However, “them” is used a handful of times in the Constitution to refer to the United States, typically in cases where it seems that the states themselves are implicated. In the Presidential Emoluments Clause, the President is prohibited from receiving emoluments from “the United States,

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<sup>28</sup> See Tillman, *supra* note 2, at 5.

<sup>29</sup> See Letter from John Quincy Adams to John Adams (June 7, 1797), in 2 WRITINGS OF JOHN QUINCY ADAMS 180 n.1 (Worthington Chauncey Ford ed., 1913) (link).

<sup>30</sup> ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1 (link).

<sup>31</sup> U.S. CONST. art. 1, § 9, cl. 8 (link).

or any of them.”<sup>32</sup> In Article III, Section 3, Clause 3, the United States is referred to as “them” instead of “it” when defining treason: “Treason against the United States, shall consist only in levying War against *them*, or in adhering to *their* Enemies, giving them Aid and Comfort.”<sup>33</sup> In this treason description, it seems that the best reading (regarding this “them”) is that treason would include levying war against an individual state, and not just the entire country, because of the word “them.” Other times, no “them” is referred to at all, but the “United States” stands alone. Of course, at the same time that the new country was being formed it was still conceived of as a plural combination of elements, instead of a unity, such that the descriptor *them* and not the unified *it*, fit the mental picture of the writers. The “them” in the Foreign Emoluments Clause could thus mean either *it* or *them*, and therefore the prohibition could apply either to all officers, or merely to those employed by the federal government. Moreover, it could have different meanings for different people who read it, but because the topic was not raised as a matter for debate, it was not clarified.

However, Tillman’s reading that the prohibition was deliberately narrowed to the federal government is arguably a better reading. Even if so, it does not seem likely to me that the committee on style, or a politicized member of that committee (on instruction or recommendation), shortened the phrase in order to *allow* state officials to accept gifts from foreign princes when they are acting as representatives. Instead, the fact that the Constitution so squarely puts foreign affairs into the hands of the federal government, and completely out of the hands of state governments, means one important thing: gifts to state officers, even if they were allowed, could not be tied to foreign policy.

A gift, whether to a state office holder or to a mere citizen, is only threatening inasmuch as it has any power to shift the orientation of the receiver towards the giver and away from the interests of the American people. If a recipient of a gift has no power to influence foreign policy, then even if his allegiances are slightly shifted, they are shifted on a matter that the recipient has no ability to influence. Consequently, the threat of corruption is negligent at best, and most likely non-existent.<sup>34</sup>

In short, even if states were intentionally excluded, the shift does not constitute an intentional grant of greater power to state officials to accept foreign gifts when representing the country, simply because they *cannot*

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<sup>32</sup> U.S. CONST. art. II, § 1, cl. 7.

<sup>33</sup> U.S. CONST. art. III, § 3, cl. 3 (emphasis added).

<sup>34</sup> My own experience with politics suggests that complete awareness of grammar and its implications comes only when there are particular highly interested parties (and there is no reason to think that there was an interested group of state officials who were aspiring to be foreign gift recipients), or debate, or a great deal more time and effort than was spent on this Constitution. In this, I suppose I differ slightly from Nicholas Rosenkrantz, who implicitly imagines a more completely aware drafting committee. See Nicholas Quinn Rosenkrantz, *The Objects of the Constitution*, 63 Stan. L. Rev. 1005 (2011) (link).



represent the country. Without this intention, even if the “Constitution of 1787 liberalized the foreign government gift-giving regime in regard to state offices,”<sup>35</sup> this liberalization does not reflect a lack of concern about corruption.

That the clause was taken seriously despite the fact that it has no means of enforcement within it is perhaps best exemplified by a fascinating anecdote. Thomas Jefferson, during his own tour as a diplomat, thought at first that he would be free from the custom of receiving gifts, which he found distasteful. As one of his biographers put it, “Jefferson thought [the royal gift] mercifully prohibited by the new Constitution.”<sup>36</sup> He knew that while he had to *give* a gift, he could not receive one. He wrote to his assistant William Short, asking him to make the “accustomary present for me” to the ambassadors—a “gold snuff box” for one and money for the other, so that he could pick out his own snuffbox.<sup>37</sup> In addition, Jefferson said, to let the appropriate parties know:

[T]hat I cannot receive the accustomary present from the King. [E]xplain to them that clause in our new constitution which says ‘no person holding any office of profit or trust under the U. S. shall accept any present, emolument, office, or title of any kind whatever from any king, prince or foreign state;.’ [I]t adds indeed ‘without the consent of Congress’ but I do not chuse to be laid on the gridiron of debate in Congress for any such paltry purpose; therefore the Introducutor need not be told of this qualification of the rule. [B]e so good as to explain it in such a manner as to avoid offence . . . .<sup>38</sup>

This effort, however, proved futile. Jefferson found himself somewhat engrossed in the gift problem,<sup>39</sup> with other diplomats refusing to accept their gifts unless he accepted his.<sup>40</sup> Eventually he did something extraordinary. He asked his secretary to accept the gift, take out the diamonds, sell the

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<sup>35</sup> Tillman, *supra* note 2, at 5.

<sup>36</sup> MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 401 (1970) (link).

<sup>37</sup> Letter from Thomas Jefferson to William Short (Apr. 6, 1790), in 12 WILLIAM. & MARY Q. 287, 294 (1932).

<sup>38</sup> *Id.*

<sup>39</sup> Jefferson’s policy concerning gifts to Foreign Diplomats involved “consult[ing] Adams, Jay, and Franklin’s grandson concerning the royal gifts made to American diplomats during the period of confederation.” *Editorial Note: Jefferson’s Policy Concerning Presents to Foreign Diplomats*, in THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION 356 (Barbara B. Oberg & J. Jefferson Looney eds., 2008), <http://www.rotunda.upress.virginia.edu/founders/default.xqy?keys=TSJN-index-21-8-209-1-2>.

<sup>40</sup> Letter from Thomas Jefferson to William Short (Jan. 24, 1791), in 13 WILLIAM. & MARY Q. 98, 98–99 (1933).

diamonds, put the money towards Jefferson's own private account, and not report it.<sup>41</sup> He insisted that it be kept "absolutely secret so as never to be suspected at court."<sup>42</sup>

Jefferson took a gift and then requested that it be physically torn apart—as if that rupture could somehow break him from the chain of dependencies created by these gifts. Perhaps he hoped that diamonds, split up and then reconstituted, might somehow break the link and that the mangled snuffbox would be rendered powerless. It is a sad postscript to the parade of snuffboxes that Jefferson could not bring himself to act consistently with the vision of government above suspicion that he was so deeply committed to realizing.

But Tillman misses what might be the most interesting feature of the FEC—that it survived in the Constitution at all. It is one of the few phrases to make the jump from the Articles of Confederation to the Federal Constitution, and it did so despite being a difficult provision to follow, given the commitment of the French government, at least, to keep giving gifts regardless of the American prohibition.

The initial draft of the new Constitution that was circulated did not include this provision, but merely prohibited titles of nobility. On August 23, however, Delegate Charles Pinkney:

urged the necessity of preserving foreign Ministers & other officers of the U. S. independent of external influence and moved to insert, after Art VII Sect 7. the clause following— "No person holding any office of profit or trust under the U. S. shall without the consent of the Legislature, accept of any present, emolument, office or title of any kind whatever, from any King, Prince or foreign State . . . ."<sup>43</sup>

It passed without discussion.

The Founders remained committed to radical transformation in the dependencies of old world politics, even if it ruffled some feathers.

### III. WHAT IS AN OFFICE UNDER AND OFFICE OF?

Tillman wants to drag me into a debate about the various uses of the word "offices" in the Constitution; I want to drag him into a discussion about what makes a legitimate "constitutional principle," and what courts ought to do with the fact that corruption was so central to the Framers. Somewhere in the tug-of-war we both, ideally, learn something. I have

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<sup>41</sup> *Id.* at 100; PETERSON, *supra* note 36, at 401–02.

<sup>42</sup> Letter from Thomas Jefferson to William Short (Jan. 24, 1791), *supra* note 40.

<sup>43</sup> James Madison, Notes on the Constitutional Convention (Aug. 23, 1787), in 4 THE WRITINGS OF JAMES MADISON 278, 284 (Gaillard Hunt ed., 1903) [hereinafter WRITINGS] (link).

already learned something: I have a greater sense of the texture of the Incompatibility Clause,<sup>44</sup> as Tillman's critique has forced me to do a close reading on the meaning of "offices," a discussion that at first seemed to me trivial. Tillman has different stakes than I, but the reason that it is not trivial for me is that (while I still disagree with Tillman about the meaning of "offices under") a close reading has helped me be more precise about what the Framers had in mind when they wrote the Foreign Emoluments Clause. In particular, it has reinforced my sense that much of what drove concerns about corruption at the time were concerns about the abuse of appointment powers and abuse by appointees.

#### A. *Under/Of*

Tillman argues that two clauses in the Constitution—Article I, Section 6, Clause 2, and Article I, Section 9, Clause 8—do not reach elective officers. I am largely persuaded by his arguments here and elsewhere that the term "office under" *generally* referred to appointed officers. However, I am not persuaded that it was the technical and precise term that he claims for it. Instead, the meaning appears to be more ambiguous.

To clarify the argument: First, offices can be elected. On this we agree. There is no dispute that "office" was used to describe elective *and* appointed positions. It is Tillman's position that the word "office" itself does not signal whether the position is elected or appointed, but that, within the Constitution, there are a limited number of explicitly designated elected offices.<sup>45</sup>

Second, civil offices can be elected. On this we agree. The only work the word "civil" does when used as an adjective to describe offices or officers is to indicate that the office is non-military. Therefore, civil offices or officers can be elected or appointed, just as other offices or officers could be.

Third, the addition of "under/of . . . [a jurisdiction]" may transform offices. On this we disagree. According to Tillman, the addition of "under the United States" or "of the United States" transforms the word "office" or "officer." When these phrases are used in conjunction with the word "office" then the office is appointed only, not elected. Therefore, prohibitions that apply to "officers under/of the United States" do not apply to the President or other elected officials.<sup>46</sup> In my view, this is not so clear cut.

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<sup>44</sup> U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office *under* the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office *under* the United States, shall be a Member of either House during his Continuance in Office.") (emphasis added) (link).

<sup>45</sup> See Tillman, *supra* note 2, at 5–8.

<sup>46</sup> *Id.* at 11–13.

To reiterate: the precise dispute is whether “offices under” or “offices of” can *ever* encompass elected offices, or whether it can only mean appointed offices. I do not believe that the words “under” and “of” add much precision. Instead, one must understand the ways in which the phrases are used in terms of the purpose of individual clauses. Within the context of the Constitution, these words, in my view, are not the clarifying words that Tillman imagines them to be. While they may have *generally* accompanied descriptions of appointed office, they did not always do so.

In this Section, I examine the evidence he provides and provide some counter-evidence.

### *B. The Hamilton List*

Tillman notes that when Alexander Hamilton was asked to produce a list of the salaries, fees, and emoluments of “every person holding any civil office or employment under the United States, (except the judges),” he did not include the President or Vice President in his report.<sup>47</sup> He takes this to be clear evidence that “office under the United States” meant only appointed, not elected, office. That may be correct. It may also be that: (1) the salaries of the President and Vice President were widely known and therefore not deemed to be necessary in the report; (2) there were other prudential or political reasons that Hamilton did not include those salaries; (3) the context in which the question was asked led Hamilton to think that it was not intended to cover the President or Vice President; (4) Hamilton understood “office under the United States” to mean what Tillman says it does, but others had a different understanding. In other words, Tillman’s careful analysis notwithstanding, it remains ambiguous whether Hamilton’s omission of the President and Vice President from his list means that neither was an “office under the United States.”

### *C. Washington’s Portrait*

Washington, as Tillman notes, accepted a print from the French Ambassador without subsequent approval from Congress.<sup>48</sup> Tillman takes this as evidence that the clause did not apply to the presidency (an elected office). I do not see it as so clear-cut. First, it may be that Washington, like Jefferson, did not want to be subject to the “gridiron of Congress,” and consciously chose to ignore the rule. It could be that Washington considered it an important political choice that outweighed the importance of following the rule because of the foreign relations at the time. It could be that portraits were thought of differently—I have not undertaken a study of portraits, but have reason to think that they played a unique role in foreign

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<sup>47</sup> *Id.* at 14–16.

<sup>48</sup> *Id.* at 16.

relations at the time and may have been understood as outside of the archetype of the “present.” It could be that Washington saw the gift as one given to him in his personal role, not his official role. It could be that Washington occupied such a unique role in American politics that his advisors were less likely to press upon him the importance of following the letter of the law. And it could be that the value of the print was so small that he did not think of it as anything more than an elaborate card.

I am not willing to take a strong stand on what Washington was thinking when he accepted the print, but it strikes me as entirely plausible that Washington acted without consideration of whether the clause applied to him, not based on a thoughtful reading of the clause. A full exploration of this action would require greater examination of the role of portraits in foreign affairs.

#### *D. Van Buren and Tyler*

Washington’s treatment seems exceptional, not normal. Instead, the documentation that exists suggests that Presidents felt bound by the constitutional provision. If Presidents felt bound, then the provision does not apply only to appointed positions. In 1840, President Martin Van Buren was offered horses, pearls, a Persian rug, shawls, and a sword by Ahmet Ben Haman, the Imam of Muscat.<sup>49</sup> The Sultan was told that the President was forbidden by the Constitution to accept the presents for his own use; Van Buren also wrote to say that it was a “fundamental law of the Republic which forbids its servants from accepting presents from foreign States or Princes.”<sup>50</sup> A joint resolution of Congress authorized him to dispose of the presents by giving some to the Department of State and giving the proceeds of the rest to the Treasury.<sup>51</sup>

A few years later, when President Tyler was given two more Arabian horses from the Sultan, he submitted them to Congress, which authorized him to auction them off and give the proceeds to the Treasury.<sup>52</sup>

#### *E. Contemporaneous Uncertainty Around “Office Under” in Impeachment*

There is some evidence about the uncertainty of the scope of “office under” in contemporaneous debate over who can be impeached. The first impeachment in the United States was of Senator William Blount in 1797. When the House of Representatives impeached him, one of Senator Blount’s arguments was that he could not be impeached because he had not

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<sup>49</sup> See MOORE, *supra* note 14, at 582.

<sup>50</sup> See 14 ABRIDGMENT OF THE DEBATES OF CONGRESS FROM 1789 TO 1856, at 141 (Thomas Hart Benton ed., New York, D. Appleton & Co. 1860) (statement of Martin Van Buren) (link).

<sup>51</sup> See MOORE, *supra* note 14, at 582.

<sup>52</sup> See S. JOURNAL, 28th Cong., 2d Sess. 255 (1845) (link).

been a “civil officer of the United States.”<sup>53</sup> The Senate rejected the House impeachment in a private decision. There is ongoing ambiguity about the reasons for the Senate’s actions in response to the House. One thing that is clear is that there was at least a live legal question about whether Blount was an officer: “[M]any debaters assumed that senators themselves were civil officers, subject to impeachment.”<sup>54</sup> The following quotes come from Tillman’s own prior research on the Blount case:

- “The propriety of the House’s action was, arguably, rejected by the Senate. However, the Senate materials are not absent ambiguity.”<sup>55</sup>
- “[I]t is not clear whether . . . [the Senate’s] refusal to take jurisdiction is to be construed to mean (1) a Senator is not an officer within the meaning of Art. II, § 4 of the Constitution or (2) that a man who has ceased to hold a ‘civil office’ is no longer subject to impeachment.”<sup>56</sup>
- “[Blount’s] lawyers pleaded lack of [Senate] jurisdiction on the ground, *among others*, that a senator was not a civil officer and thus not subject to impeachment. The Senate dismissed the case, giving no reason for its decision. Since Blount had been expelled [by the Senate] before the dismissal [of the impeachment proceeding], another interpretation is that a member of Congress loses his status as a civil

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<sup>53</sup> Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13, 86–87 (2001) (“Before arguing anything else, Blount’s representatives, Jared Ingersoll and A.J. Dallas, asked the Senate to dismiss the impeachment case: ‘[A]lthough true it is, that he, the said William Blount, was a Senator of the United States from the State of Tennessee, at the several periods in the said articles of impeachment referred to, yet that he, the said William, is not now a Senator, and is not, nor was at the several periods so as aforesaid referred to, a civil officer of the United States.’”) (link).

<sup>54</sup> *Id.* at 52.

<sup>55</sup> Seth Barrett Tillman, *Interpreting Precise Constitutional Text: The Argument for a “New” Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause—A Response to Professor Josh Chafetz’s Impeachment & Assassination*, 60 CLEV. ST. L. REV. (forthcoming 2012) (manuscript at 5 n.9), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1622441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622441)## (link).

<sup>56</sup> *Id.* (quoting RICHARD D. HUPMAN, SENATE ELECTION, EXPULSION AND CENSURE CASES FROM 1789 TO 1960, S. DOC. NO. 71, 87th Cong., 2d Sess. 3 (1962)).

officer, and therefore may not be impeached, after he is expelled from Congress.”<sup>57</sup>

- “Their deliberations, after the argument of counsel, being held in private, we can *only infer* from those arguments, that the term *officers of the United States*, as used in the Constitution, was held by a majority of the senate, not to include members of the senate, and on the same principle, members of the house of representatives would also be excluded from this jurisdiction.”<sup>58</sup>

Ten years after the Constitution was written, the House of Representatives and the Senate disagreed on the scope of an “officer of the United States.” It was not the clear term of art that Tillman suggests, or it would have been an open-and-shut case, with no discussion. What I take from the story is that the phrase “office of” was not a clear signal of “appointed office.” Even if a majority of Senators ultimately agreed with Blount’s argument—and it is not certain that they did—they might have been persuaded for non-textual reasons, and not simply the use of the word “of.”

#### F. State Usage of “Under/Of”

The incompatibility doctrine had a reasonably active life in the state courts of the nineteenth century—further illustrating a historically casual interchange of “under” and “of.” Under the incompatibility doctrine, the general rule was that if someone took an office that was incompatible (typically as defined by the state constitution) with another, they were deemed to have resigned from the first office. Litigation, then, surrounded questions of whether the particular offices fell within incompatibility provisions. In this resulting litigation, “office under” and “office of” were often used to describe appointed positions, but there was nothing absolute or technical about the use of these phrases that suggests, as Tillman would have it—that the preposition answers the “elected/appointed” question conclusively.

The difficult debates at the time were about the complex interaction between common law incompatibility doctrines, state statutes, state constitutions, and imprecise drafting.<sup>59</sup> They were not about the “under” or “of” as the words were used casually. By way of example (but not

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<sup>57</sup> *Id.* at 6 n.9 (emphasis added) (quoting JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND EARLIEST APPLICATIONS* 40 n.5 (1976)).

<sup>58</sup> *Id.* (emphasis added) (quoting WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 214 (Philadelphia, Philip H. Nicklin 2d ed. 1829)).

<sup>59</sup> *See, e.g.,* *State v. Buttz*, 9 S.C. 156 (S.C. 1877).

exhaustive), in a Pennsylvania case, an issue framed by the lawyer in the language of “trust or profit,”<sup>60</sup> was reframed by the court as “[i]s the place of deputy marshal an office under the Constitution and laws of the United States?”<sup>61</sup> If Tillman is right that “office under. . . [a jurisdiction]” is a signal to appointment, the court was very loose about the signaling in that case.

In that Pennsylvania case, the court noted section 13 of the Act of July 2, 1839, (Pamph. Laws, 521,) which directs the sheriff to:

give notice that every person, excepting justices of the peace, who shall hold any office or appointment of profit or trust under the government of the United States, or of this State, or of any city or incorporated district, whether a commissioned officer or otherwise, a subordinate officer or agent, who is or shall be employed under the legislative, executive, or judiciary department of this State, or of the United States, or of any city or incorporated district; also, that every member of Congress and of the State legislature, and of the select or common council of any city, or commissioner of any incorporated district,—is by law incapable of holding or exercising at the same time the office or appointment of judge, inspector, or clerk of any election of this Commonwealth; and that no inspector, judge or other officer of any such election, shall be eligible to any office to be then voted for.<sup>62</sup>

Two parts of this passage assume that “office . . . under” can be elected. First, Justices of the Peace were frequently elected. Second, the category of those holding “office or appointment” under the United States includes those who are employed under the “legislative, executive, or judiciary . . . .” “Members of Congress” are included in the description.

In an 1877 case from South Carolina,<sup>63</sup> for example, a lawyer described the incompatibility clauses this way in passing:

In the earlier times there existed extreme jealousy between the States and the general government, which created a public sentiment against the officer of the one at the same

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<sup>60</sup> The lawyer argued that “[t]his office [of deputy marshal] is not, however, within the letter or the spirit of the constitution or statute; it is not one of trust or profit; he is the mere agent of the marshal, who is not bound to appoint him, but may perform the duties himself.” *Commonwealth ex rel. Owine v. Ford*, 5 Pa. 67, 68–69 (1846).

<sup>61</sup> *Id.* at 69.

<sup>62</sup> *Id.* at 70–71 (emphasis omitted).

<sup>63</sup> *Buttz*, 9 S.C. at 156.



time holding office under the other, and statutes were very generally passed to prevent it—it being conceded then that there existed no inherent incompatibility, nothing of inconsistency in the nature and reason of the thing outside of statute.<sup>64</sup>

The Court uses both “of” and “under” in this passage to encompass elected positions. The case itself, however, helps Tillman’s position, inasmuch as it describes the core theory of incompatibility as one of control—offices are deemed to be incompatible if a person in one office has control over the other office. Tillman gets the spirit of the Incompatibility Clause right, but might overstate the precision which is used to express it.

There are dozens of forms of the Incompatibility Clause in state constitutions.<sup>65</sup> When interpreting these clauses, the courts do not look at “under” or “of” as controlling, but rather examine the core principles and intentions of the constitutional provisions.<sup>66</sup>

Furthermore, the language of the statutes and constitutions suggests no such clear line coming from the “under/of” language.

South Carolina passed its own Incompatibility Act in 1787, stating that “no officer heretofore elected, or hereafter to be elected, to any pecuniary office in this State, above one hundred and fifty pounds, shall hold any other office of emolument under this or the United States.”<sup>67</sup> An “officer” is “elected” in this vision and is prohibited from holding any “other office under this or the United States.” The use of the word “other” here indicates that the first instance of election was also an “office under this [State].”

The Pennsylvania Constitution provided that:

No member of Congress from this state, nor any person holding or exercising any office of trust or profit under the United States, shall, at the same time, hold or exercise the office of Judge, Secretary, Treasurer . . . or any office in

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<sup>64</sup> *Id.* at 166.

<sup>65</sup> See *Dual Office Holding—Restrictions on State Legislators Concurrently Holding a Second Elected Office*, NAT’L CONFERENCE OF STATE LEGISLATORS (Dec. 2011), available at <http://www.ncsl.org/legislatures-elections/ethics/home/restrictions-on-holding-concurrent-office.aspx> (link).

<sup>66</sup> See, e.g., *Harvey v. Ridgeway*, 450 S.W.2d 281, 283 (Ark. 1970) (using secondary source opinions to decide whether delegates to a constitutional convention should be considered to hold elected office incompatible with a seat in the state legislature) (link); *Morris v. Parks*, 28 P.2d 215 (1934) (distinguishing between “officer” and “employee”); *Hollinger v. Kumalae*, 25 Haw. 669 (1920) (deciding whether a municipal officer should be considered an officer of the Territory of Hawaii). The difficult question is more often whether municipal office holders count as holding an incompatible office, and not whether the alternative office is elected or appointed.

<sup>67</sup> Act No. 1368 of 1787, reprinted in 5 Stat. at Large of South Carolina 21 (T. Cooper ed. 1839) (link).

this state, to which a salary is by law annexed, or any other office, which future legislatures shall declare incompatible with offices or appointments under the United States.<sup>68</sup>

The use of “offices *or* appointments” seems to suggest that offices and appointments are not the same thing for Pennsylvanians.

In short, the use of “under” in the Incompatibility Clause does not clarify the meaning of “office” within the clause. An 1867 case illustrates the distinction between the spirit and the language. In this case, one particularly ambitious individual was “elected” twice: once by the public (to a position on the city council), and once by the city council (to the position of city marshal).<sup>69</sup> The term “election” was used to describe each selection process.<sup>70</sup> The Court concluded that these were two “incompatible” positions because the individual used his position as city councilman to get his position as marshal.<sup>71</sup> The technical terms “under the state” or “of” were not used; the core issue was that the positions were in conflict regarding the proper separation of powers, and were therefore incompatible. It is my guess that it is this kind of relationship that the Incompatibility Clause was meant to avoid, and that the use of the terms “under” and “of” are not, and should not be, the center of the inquiries around the Incompatibility Clause.

My own view is *not* that “under the United States” always referred to elected and appointed officials; rather it is that the meaning was not precise or clear, and *might* have encompassed elected officials. I see no indication in the texts that “under” was a critical, signaling preposition; instead, other words and frameworks were important for the cases.

### *G. Does the Foreign Emoluments Clause Apply to Elected Officials?*

What does this do to the Foreign Emoluments Clause? Because I am not persuaded that the “under/of” language does what Tillman says it does, it is unclear whether it was intended to apply to elected officials as well as appointed officials. I suspect that the prospect was not squarely contemplated. We agree that the clause was designed for diplomats; however, this does not mean that it was intentionally designed to exclude elected officials. What a Senator ought to do when offered a gift by the King of France or a post of employment by Britain was not a subject of debate. When something is outside the precise contemplation of a clause,

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<sup>68</sup> PA. CONST. OF 1790, art II, § 8 (link).

<sup>69</sup> *State ex rel. Rosenheim v. Hoyt*, 2 Or. 246, 246–47 (1867).

<sup>70</sup> There is a more general point hidden here; the word “election” is a mode of choice, not always associated with popular election, and so the “election/appointment” divide itself is not as clear-cut as Tillman assumes.

<sup>71</sup> *Hoyt*, 2 Or. at 249.

therefore, I suggest that the correct way to think about it is to examine the core principles behind the clause.

What, for instance, do we imagine would have happened if an 1805 Senator had been given a post and a salary by Britain? What if the Vice President had been granted a title of nobility by France and did not ask permission to accept it? My stories have focused on the “gifts” part of the clause, but the other features of it—those that ban emoluments, offices, and titles—help lead the intuition in response to these hypotheticals.

Given the time, context, and concern about foreign powers and the dependencies they create, I would guess that if the Representative from Vermont was given a paid position in the French diplomatic corps, for instance, everyone at the time would have understood it to violate the Foreign Emoluments Clause. If a Senator from Virginia was given the title of Duke from Great Britain, it would be attended by constitutional outrage, not just popular outrage. Joseph Story, in his commentaries on the Constitution, makes a similar argument. The proposed Thirteenth Amendment to the Constitution would have extended the Foreign Emoluments Clause to all American citizens. In 1851 Story argued that the reason this Amendment was not passed was likely because it was seen as unnecessary.<sup>72</sup>

To my understanding of the time, the hypothetical Senator’s efforts in 1805 to raise “under” or “of” as defenses to his actions would be of no avail. In other words, while I am persuaded that “offices under” generally meant what Tillman thinks it meant, each clause is different, and these prepositions lacked the transformative and definitional power he ascribes to them.

#### IV. HOW MUCH DOES IT MATTER?

Let us assume, however, that Tillman is right in all these critiques: (1) that there was a deliberate effort to allow state officers to accept foreign gifts (which I think highly implausible); (2) that the Foreign Emoluments Clause applies only to appointed, not elected officials (which I think unlikely); and (3) that the Framers deliberately ignored threats to corruption that they did not embed in the Constitution (which I also think unlikely). I still believe these critiques matter less than Tillman makes them seem in determining the scope of the anti-corruption principle.

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<sup>72</sup> See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1346, at 216 (1833) (“It is singular, that there should not have been, for the same object, a general prohibition against any citizen whatever, whether in public or private life, accepting any foreign title of nobility. An amendment for this purpose has been recommended by congress; but, as yet, it has not received the ratification of the constitutional number of states to make it obligatory, probably from a growing sense, that it is wholly unnecessary.”) (link).

### A. Application to State Office Holders

It is my position that there is an anti-corruption principle that applies, either as a freestanding principle or as a canon of construction, to all constitutional matters, be they state or federal. Tillman argues that if the Foreign Emoluments Clause was only intended to apply to the federal government, it could not now apply to the states. At the same time, he accepts that there is a federal ACP. While he does not lay it out as clearly as this, the implication of his argument is either that: (1) there is a federal ACP and no state ACP, or (2) the state ACP is weaker than the federal ACP.

He appears to adopt (2) in this passage:

[I]f her historical claim is incorrect . . . [and] the scope of the Foreign Emoluments Clause is limited to *Offices . . . under [the United States]*, and excludes *offices under any State*, it would seem to follow that if there is a structural anti-corruption principle of constitutional dimension, the scope of that principle—even if “translated” into modern circumstances—cannot reach state election processes.<sup>73</sup>

To paraphrase: under Tillman’s analysis, the ACP has power to shape constitutional interpretation of federal election laws, but not state election laws. To understand the implication of this position, consider the recent decision in *Citizens United*.<sup>74</sup> In *Citizens United*, the Supreme Court struck down federal legislation designed to prevent political corruption and reduce the corrupting tendencies of money in politics. This statute was limited to federal offices. If the majority of the Supreme Court had adopted the anti-corruption principle as a freestanding constitutional principle that ought be weighed against the First Amendment concerns, instead of as a non-constitutional state justification for the laws, I believe (with some evidence from the dissent<sup>75</sup>) the Court might have upheld the congressional ban on corporate independent expenditures. However, at a minimum the Court would have structured the argument and decisions differently, giving far more weight to anti-corruption concerns, broadly understood.

By separating state government from the federal government, Tillman argues that a state-based ban on corporate independent expenditures would be far less likely to be upheld because the anti-corruption principle does not reach state legislatures within the FEC. He does not directly address whether states have authority to regulate their own offices or elections;

<sup>73</sup> Tillman, *supra* note 2, at 6.

<sup>74</sup> *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (link).

<sup>75</sup> See *id.* at 961–70 (Stevens, J., dissenting) (devoting a separate section to the importance of the anticorruption interest, grounding it in founders’ history).

however, if all else remained equal, the implications of his acceptance of a weaker state ACP suggests that a different analysis would apply.

Therefore, he could argue that *Citizens United* might have been approached with the wrong methodology because it did not recognize the federal anti-corruption principle,<sup>76</sup> but that the recent Montana Supreme Court case which upheld state laws banning independent expenditures was also wrongly decided, because states cannot invoke the federal anti-corruption principle as justification for their laws.<sup>77</sup>

If Tillman has a strong view of non-textual principles, or a strong view of Article I, Section 2 of the Constitution, he might argue that taking both the ACP and federalism seriously would result in a wash—state restrictions would be granted more deference because they come from the state, and federal regulations would be granted more deference because they are buoyed by the ACP. I am interested to hear his views.

Tillman's argument relies on the FEC being the heart of the ACP. I do not believe it is. It is a useful symbolic example, but unlike other clauses—like those governing elections, civil office-holding, and the veto—it is not at the heart of the constitutional principle. It is an example and a support for the principle, not the driver of it.

However, what I had not considered prior to his reading is the challenge posed by the incorporation principle. The incorporation principle typically applies to rights, not principles like the separation of powers. Therefore, even if he is wrong about the FEC, he might be right that the ACP does not apply to state laws because there is no way it can be incorporated directly against the states.

This challenge requires us to return to principles about principles. There are three ways to understand the anti-corruption principle. First, the ACP can be a rule of construction that helps make sense of other provisions in the Constitution, including the First Amendment. Second, it can be a freestanding principle that can be weighed against other constitutional provisions (in which case it would also be substantially incorporated into state law by the Due Process Clause.) Third, it can be understood as the “true” separation of powers principle.

While incorporation and application to the states is more analytically tricky, if the First Amendment cannot be understood without understanding the anti-corruption principle (and I would argue that it cannot), then at least (a) as a canon of construction, the anti-corruption principle is applied to the First Amendment's application to state law, and (b) it affects all federal legislation.

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<sup>76</sup> *Id. passim*.

<sup>77</sup> *W. Tradition P'ship, Inc. v. Attorney Gen. of State*, 271 P.3d 1 (Mont. 2011) (link).

### B. Application to Elected Officials

Tillman argues that because the word “offices of trust or profit” does not mean elected officials, the ACP does not apply to election law regimes.<sup>78</sup> For now, suffice it to say that I think he gets this wrong for two reasons: (1) the ACP *qua* principle is part of the structure of the entire Constitution, so the fact that a few of the many anti-corruption provisions might not apply to elected officials does not mean that it does not apply to election laws; and (2) the term office of profit or trust is by no means clearly preclusive of elected officers, as I have argued above.<sup>79</sup> Moreover, even if the references to officers and offices of profit or trust do not apply directly to elected officials, one core purpose of the clause is to keep people from achieving *elected* office in order to secure *appointed* office for themselves and their friends. Therefore, it applies directly and explicitly to the problems of temptations that attend elected office and is an attempt to structure the perks of election in such a way as to encourage those to stand for election for reasons of the public, instead of private, good.

### C. That the Framers Could Have Done More Does Not Disprove the Point

Tillman next argues that the Framers were not obsessed with corruption. The thrust of his argument that one cannot believe that the Framers were intensely focused on corruption (obsessed, as it were), basically boils down to this: Why didn’t they do more? Why didn’t they make sure that the foreign gifts provision didn’t apply to every conceivable office? Why didn’t they ensure that impeached officers could not serve again? Why didn’t they underline (if that was in fact the intent) that no state official could receive snuffboxes from the King of France?

Perhaps we have different definitions of obsession. My point is that in the context of the writing of the Constitution, corruption was the touchstone by which clauses were examined and the theme with which the basic structural elements of the Constitution were assembled. I do not mean that every possible “corrupt” scenario was imagined and protected against, which would of course be a different kind of obsession. But I do mean obsession in the sense that corruption was the orientation of the minds of the men who wrote the Constitution. The evidence that is needed, then, to support this claim is found in the *way* they spoke about the provisions, and not so much (as Tillman seems to suggest) in the exhaustiveness with which they imagined every single corrupting instance imaginable.

He writes:

[I]f the Framers had been “obsessed” with corruption, it is difficult to understand why state offices (and thereby state

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<sup>78</sup> Tillman, *supra* note 2.

<sup>79</sup> See *supra* Section III.

election processes) and all these federal positions and possibilities (e.g., continued government service after disqualification for corruption and inheritance under foreign law) were left beyond the scope of the Foreign Emoluments Clause. Was not inheritance the dominant way foreign titles were transmitted in the eighteenth century? Would inheritance of titles have been beyond the imagination of the Framers in a corruption-obsessed world?<sup>80</sup>

The simple answer is that the test is not whether something is “beyond imagination” or not. But again, perhaps the disagreement is simply with the word “obsession,” which I have no attachment to, and agree with Professor Tillman that I might have overused.

What I mean by “obsession” is that there was a fundamental anxiety that most of the men who were involved in the drafting of the Constitution shared. That anxiety was concern that structures could be set up that would enable those with access to money to “buy” the loyalties of those with less access to money and that this relationship would lead to long-term dependency. This is not the format for an exhaustive display of the perpetual fear of corruption. But, for examples, Madison and Morris both explored the threat of representatives and monarchs being bribed by interests to betray the public trust in their July 20 discussion in the convention;<sup>81</sup> Benjamin Franklin expressed concern about how the veto could lead to “bribes and emoluments” and the threat that “more power and money would be demanded, till at last eno’ would be gotten to influence & bribe the Legislature into a compleat subjection to the will of the Executive”;<sup>82</sup> Madison feared that “foreign powers would make use of strangers as instruments for their purposes. Their bribes would be expended on men whose circumstances would rather stifle than excite jealousy & watchfulness in the public”;<sup>83</sup> and Williamson feared that “[b]ribery & cabal can be more easily practised in the choice of the Senate which is to be made by the Legislatures composed of a few men, than of the House of Represents. who will be chosen by the people.”<sup>84</sup>

Not all of the men at the convention brought this same anxiety, and they did not all share the same depth of concern about it. I am not claiming an absolute or uniform purpose, but a generally shared one.

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<sup>80</sup> Tillman, *supra* note 2, at 9.

<sup>81</sup> See James Madison, Notes on the Constitutional Convention (July 20, 1787), in 4 WRITINGS, *supra* note 43, at 12, 12–21 (link).

<sup>82</sup> See James Madison, Notes on the Constitutional Convention (June 4, 1787), in 3 WRITINGS *supra* note 43, at 79, 83 (link).

<sup>83</sup> James Madison, Notes on the Constitutional Convention (Aug. 9, 1787), in 4 WRITINGS, *supra* note 43, at 140, 140–155 (link).

<sup>84</sup> *Id.*

I use the word “obsession” advisedly—my own reading of the notes from the convention suggest that regardless of the topic, the issues of influence, dependence, and corruption were at the front of mind for many of the speakers there. It occupied their intelligences and challenged their thinking. The question of money and influence was as dominant a question as any other in the writing of the Constitution. If one reads the notes from the convention as trace evidence of a play, I think it is a fair reading of motive and purpose.

The task of determining purpose is necessarily more of a literary task than a mechanical one—people leave trace evidence that can be interpreted in many ways, and the task of figuring out meaning requires guessing about human nature and the relationship between thought and expression as it applies to each individual. The anti-corruption principle is not an original idea; instead, I think it is a basic way of thinking about the Constitution that was lost in the mid-nineteenth century. The writings of Gordon Wood,<sup>85</sup> Bernard Bailyn,<sup>86</sup> and others tell the story of the founding era’s focus on corruption, but the core of my argument is that there has been a mismatch between our historical understandings (which accept corruption as the grammar of the time) and our legal understandings.

#### CONCLUSION

It may be useful to explain how I reconstruct the anxiety that drove the obsessive (if I may) focus on corruption during the framing of the Constitution. As I imagine it, the primary world view involved a set of beliefs about human motivation that assumed that the same person could be virtuous or corrupt, depending on a combination of circumstance, temptation, and temperament. This world view saw the relationship of the public servant to the public as one might imagine the relationship of a mother to her children. Just as it was psychologically plausible to imagine a mother having a healthy self-regard while still putting the interests of her child first, it was psychologically plausible to imagine a political officeholder, either elected or appointed, holding himself in healthy self-regard while putting the interests of the public first.

A mother might pursue other interests than that of her children out of self-interest, or out of an inappropriate dependency upon another, usually because that other was paying her. Similarly, a public official might fail in his obligation to be a public-regarding, public-oriented public official, either out of self-interest, or because of an inappropriate dependency upon another. The citizens of the founding era had seen in recent British history

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<sup>85</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (link).

<sup>86</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION*, at xiii (enlarged ed. 1992) (link).



both kinds of this behavior, which they called “corruption.”<sup>87</sup> The great heart of the fear was the relationship between the crown and appointed offices, because that was what they had experienced. They were very anxious about the fact that there was no way to have appointed offices without *someone* doing the appointments. Given the experience in England, they were worried that the appointees’ reliance on the appointing power’s initial and future goodwill might lead the appointees to be oriented towards the appointer instead of the public and thus fail to serve the public interest. With the prize of appointments (at the time), the great fear was that the appointers would use the power of appointment to wrest great control from the people.

As Tillman points out, this is deeply aligned with contemporary scholarship around the idea that public servants are fiduciaries.<sup>88</sup> In the contemporary vein, this is thought of in terms of “fiduciary law.” He writes that the principle “puts federal statutory officers in a fiduciary relationship under the government, in respect to the officers’ elected masters and all of the nation’s citizens.”<sup>89</sup> At the time of the framing, however, the language focused less on fiduciaries and more on the spectre of corruption, where self-interest, pressure, and power might lead elected and appointed officials to stray from the public’s interest.

I argue that this was not merely a background world view at the time but was in fact at the center of the Constitutional Convention, and was one of the core purposes behind the structure of Constitution itself. Therefore, I argue, we should give the principle and purpose of the Constitution’s anti-corruption principle real weight in deciding close cases. However, one of the things Tillman’s critique points to is the question of this principle’s scope—a very important conversation to have, and one which (as I argue above) goes not merely to this principle, but to constitutional principles in general, and their appropriate role in constitutional decision and thought.

Tillman and I bring to this exchange two different sets of concerns, and while they overlap (which makes this fruitful), our fundamental orientation is different. He would pull the discussion more towards a debate on offices and the meanings of the particular terms, and I would pull it more towards a debate on constitutional principles and how to relate purpose, text, and structure. Our surface disagreements mask a generally shared understanding of history, but that agreement then masks a disagreement about what is most worth fighting over. In the next round, I will be interested to see if we come any closer.

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<sup>87</sup> Patrick Henry, Speech on the Expediency of Adopting the Federal Constitution (June 7, 1788), in 1 ELOQUENCE OF THE UNITED STATES 178, 223 (E.B. Williston ed., 1827) (“Look at Britain; see there the bolts and bars of power; see bribery and corruption defiling the fairest fabric that ever human nature reared.”) (link).

<sup>88</sup> Tillman, *supra* note 2, at 20–21.

<sup>89</sup> *Id.*